The Honorable John C. Coughenour

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

YIM, *et al.*,

Plaintiffs,

vs.

CITY OF SEATTLE,

Defendant.

No. 2:18-cv-736-JCC

CITY OF SEATTLE'S **REPLY** REGARDING ITS MOTION TO CERTIFY A QUESTION TO THE WASHINGTON SUPREME COURT

NOTE ON MOTION CALENDAR: Friday, February 1, 2019

Certification is appropriate here. Plaintiffs' arguments to the contrary lack merit. The City respectfully asks this Court to exercise its discretion to certify to the Washington Supreme Court the question of what analysis that court applies to a substantive due process claim arising under the Washington Constitution.

Plaintiffs do not dispute that comity and federalism favor allowing a state's highest court to resolve difficult state constitutional law questions.[1] Nor do Plaintiffs question the judicial economy of certification here.[2] Instead of predicting whether and how the Washington Supreme Court will answer the due process question in *Yim I*, this Court can pose the question directly.

[1] *See Barnes-Wallace v. City of San Diego*, 607 F.3d 1167 (9th Cir. 2010); City's Mot. to Certify, Dkt. # 51 at 5. The same is true of important state statutory and common law questions. *See, e.g.*, *Moore v. King Cty. Fire Prot. Dist. No. 26*, 545 F.3d 761, 763 (9th Cir. 2008); *Kremen v. Cohen*, 325 F.3d 1035, 1037 – 38 (9th Cir. 2003).

[2] *See* City's Mot. to Certify, Dkt. # 51 at 5.

Peter S. Holmes
Seattle City Attorney
701 Fifth Ave., Suite 2050
Seattle, WA 98104-7097
(206) 684-8200

Resolving it will not take long—because the same lawyers on behalf of virtually the same parties have already briefed the same question before the Washington Supreme Court in *Yim I*, any supplemental briefing to that Court on a certified *Yim II* question could occur quickly.

The question is subject to certification because Washington's law of substantive due process has not been clearly determined.[3] Plaintiffs devote much of their response to rehashing the merits of their summary judgment motion, arguing that the Washington Supreme Court would apply the "undue oppression" analysis in a case like this.[4] That fails to prove the question is settled, especially given the City's summary judgment briefing countering Plaintiffs' arguments.[5] Lower courts agree Washington's substantive due process law is unsettled. The Washington Court of Appeals in 2015 "acknowledge[d] that there appears to be some confusion over the proper test to apply" to a substantive due process challenge, so applied both tests to reject the challenge.[6] And a King County Superior Court judge last year concluded "the case law applying the standard of review in a 'substantive due process claim' has produced a rather murky area of case law and needs clarification."[7]

Certification is appropriate because, unless this Court rules for one party under both the "rational basis" and "undue oppression" analyses, this Court needs an answer from the

[3] RCW 2.60.020 (authorizing certification when "the local law has not been clearly determined").

[4] Pls. Opp. to Motion to Certify, Dkt. # 52 at 3 – 7.

[5] *See* City's Opp. & Cross Mot., Dkt. # 33 at 22 – 27; City's Reply in Supp. of Cross Mot., Dkt. # 50 at 8 – 11. To the extent Plaintiffs' response raises new arguments, the City does not concede them. Belaboring such arguments in this motion serves no purpose.

[6] *Cannatonics v. City of Tacoma*, 190 Wn. App. 1005, 2015 WL 5350873 *4 n.7 (2015, unpublished).

[7] Order Granting City of Seattle's Cross Motion for Summary Judgment and Denying RHA's Cross Motion for Summary Judgment, *Rental Housing Ass'n v. City of Seattle*, King County Superior Court No. 17-2-13662-0 SEA at 10:17 – 18 (Sept. 19, 2018). **Appendix 1**. Although RHA appealed that decision, the Washington Court of Appeals dismissed the appeal on RHA's request. **Appendix 2**.

Peter S. Holmes
Seattle City Attorney
701 Fifth Ave., Suite 2050
Seattle, WA 98104-7097
(206) 684-8200

Washington Supreme Court to dispose of this case.[8] Only with that answer can this Court efficiently consider the facts of this case and dispose of it. Plaintiffs misread *Bylsma* as holding the answer to a certified question must be outcome determinative.[9] *Bylsma* noted an answer from the Washington Supreme Court would be outcome determinative there, but announced no rule that an answer *must be* outcome determinative to certify the question.[10] *Bylsma* used "outcome determinative" only to mean that, with the legal question answered, the federal case could proceed by applying the law to the facts—which is why the Ninth Circuit remanded *Bylsma* to the District Court after receiving the Washington Supreme Court's answer.[11]

The City has proceeded expeditiously in good faith. Plaintiffs' claims of undue delay are unfounded. Last May—facing the short window in which to remove this case and its core First Amendment claim to federal court—the City did not know whether the Washington Supreme Court would accept direct review of *Yim I*. Had that Court sent *Yim I* to the Washington Court of Appeals, the City likely would not have sought certification from this Court. In its opening brief on cross motions for summary judgment in *Yim II*, the City notified this Court and Plaintiffs about *Yim I* and the prospect of the City asking this Court to certify once the parties completed their *Yim II* summary judgment briefing.[12] And the City filed its motion to certify with its final brief on the cross motions.[13] The City had to wait for that briefing to conclude—without it, this

[8] RCW 2.60.020 (authorizing certification when "it is necessary to ascertain the local law of this state in order to dispose of such proceeding").

[9] Pls. Opp. to Motion to Certify, Dkt. # 52 at 3:14 – 15 (citing *Bylsma v. Burger King Corp.*, 676 F.3d 779, 783 (9th Cir. 2012)).

[10] *Bylsma*, 676 F.3d at 783.

[11] *Bylsma v. Burger King Corp.*, 706 F.3d 930, 931 – 32 (9th Cir. 2013).

[12] City's Opp. & Cross Mot., Dkt. # 33 at 33:1 – 8.

[13] *See* City's Reply in Supp. of Cross Mot., Dkt. # 50; City's Mot. to Cert. a Question, Dkt. # 51.

Peter S. Holmes
Seattle City Attorney
701 Fifth Ave., Suite 2050
Seattle, WA 98104-7097
(206) 684-8200

Court could not assess the status of Washington's substantive due process law or have a complete record to transmit to the Washington Supreme Court.[14]

Plaintiffs find no Ninth Circuit authority supporting their suggestion that the City is gaming the system by seeking certification after removing this case from a state court. The Ninth Circuit warns against a party seeking certification to get a second chance of victory after an adverse District Court ruling, but that concern is not germane here.[15] Plaintiffs turn to a Fourth Circuit *dictum* disfavoring certification when a party removed the case to federal court after an adverse state court ruling,[16] but overlook a later ruling explaining that court's real concern is the one voiced by the Ninth Circuit: a party seeking certification to "forum shop" after an adverse ruling from a lower federal or state court.[17] Plaintiffs also invoke a Seventh Circuit decision,[18] overlooking a later Seventh Circuit decision explaining that whether the party seeking certification had removed the case to federal court is "not a primary factor" when deciding whether to certify a question.[19]

Plaintiffs fail to substantiate their claim that certification of the due process question would cause intolerable delay in resolving their First Amendment claim. Plaintiffs cite only cases

---

[14] *See* RCW 2.60.020 (the federal court must assess whether Washington law has not been clearly determined); RCW 2.60.030(2) (the certificate procedure "shall include and be based upon the record").

[15] *See, e.g., Alliance for Prop. Rights & Fiscal Responsibility v. City of Idaho Falls*, 742 F.3d 1100, 1108 (9th Cir. 2013); *Thompson v Paul*, 547 F.3d 1055, 1065 (9th Cir. 2008).

[16] Pls. Opp. to Motion to Certify, Dkt. # 52 at 7 – 8 (citing *National Bank of Wash. v. Pearson*, 863 F.2d 322, 327 (4th Cir. 1988)). "Certification would be inappropriate here, however, because Pearson himself removed this case from Maryland state court *after the Maryland judge decided the question against him*." *National Bank*, 863 F.2d at 327 (emphasis added). *National Bank* appears to have raised and dismissed the prospect of certification on its own, not in response to a motion to certify. *See id*. at 326 – 27.

[17] *Allen v. Choice Hotels Intern., Inc.*, 276 Fed. Appx. 339, 341 (4th Cir. 2008).

[18] Pls. Opp. to Motion to Certify, Dkt. # 52 at 8:6 – 9 (citing *Doe v. City of Chicago*, 360 F.3d 667, 672 (7th Cir. 2004)).

[19] *Rain v. Rolls-Royce Corp.*, 626 F.3d 372, 378 – 79 (7th Cir. 2010).

Peter S. Holmes
Seattle City Attorney
701 Fifth Ave., Suite 2050
Seattle, WA 98104-7097
(206) 684-8200

noting the delay resulting from a federal court invoking the abstention doctrine to send a case to a state trial court.[20] But federal courts look to certification—which sends a question directly to the highest state court—as a relatively expeditious alternative to abstention.[21] Plaintiffs claim no First Amendment damages and do not explain how they would be prejudiced by delay, let alone why that prejudice outweighs the benefits of allowing the Washington Supreme Court to resolve a key question of Washington constitutional law.

The City respectfully asks this Court to exercise its discretion to certify the question of what analysis applies to a substantive due process claim under the Washington Constitution and stay further proceedings in *Yim II* pending resolution of the certified question.

Respectfully submitted, February 1, 2019,

PETER S. HOLMES
Seattle City Attorney

By: *s/Roger D. Wynne*
s/Sara O'Connor-Kriss
Roger D. Wynne, WSBA #23399
Phone: (206) 233-2177
Sara O'Connor-Kriss, WSBA #41569
Phone (206) 615-0788
Seattle City Attorney's Office
701 5th Avenue, Suite 2050
Seattle, WA 98104
Roger.Wynne@seattle.gov
Sara.OConnor-Kriss@seattle.gov
Attorneys for Defendant City of Seattle

SUMMIT LAW GROUP PLLC

By: *s/Jessica L. Goldman*
Jessica L. Goldman, WSBA #21856
Summit Law Group
315 5th Ave. South, Suite 1000
Seattle, WA 98104
Phone: (206) 676-7062
jessicag@summitlaw.com
Attorneys for Defendant City of Seattle

[20] Pls. Opp. to Motion to Certify, Dkt. # 52 at 9:14 – 14 (citing *Zwickler v. Koota*, 389 U.S. 241, 252 (1967); *Courthouse News Serv. v. Planet*, 750 F.3d 776, 784 (9th Cir. 2014); *Porter v. Jones*, 319 F.3d 483, 492 – 93 (9th Cir. 2003)). Plaintiffs cite a Ninth Circuit dissent raising concerns about delay arising from certification, without acknowledging that the majority certified the question despite those concerns. *Id*. at 9:14 – 16 (citing *Kremen*, 325 F.3d at 1044 (Kozinski, J., dissenting)). *Cf. Kremen*, 325 F.3d at 1037 – 38 (majority's rationale for certification).

[21] *See, e.g.*, *Lehman Bros. v. Schein*, 416 U.S. 386, 391, 394 (1974) (certification would "engender less delay and create fewer additional expenses for litigants than would abstention").

CERTIFICATE OF SERVICE

I certify that on this day I electronically filed this document and its two appendices with the Clerk of the Court using the CM/ECF system which will send notification of such filing to:

Brian T. Hodges
Ethan W. Blevins
Pacific Legal Foundation
10940 NE 33rd Place, Ste. 210
Bellevue, WA 98004
425-576-0484
bth@pacificlegal.org
eblevins@pacificlegal.org
Attorneys for Plaintiffs

Hillary Madsen
Kimberlee L. Gunning
Nicholas Brian Allen
Columbia Legal Services
101 Yesler Way, Ste. 300
Seattle, WA 98104-2552
206-464-0838
hillary.madsen@columbialegal.org
Kim.Gunning@columbialegal.org
nick.allen@columbialegal.org
Attorneys for Amici Curiae *Pioneer Human Services and Tenants Union of Washington*

Eric Dunn
National Housing Law Project
919 E. Main Street, Ste. 610
Richmond, VA 23219
415-546-7000 ext. 3102
edunn@nhlp.org
Attorney for Amici Curiae *National Housing Law Project and Sargent Shriver National Center on Poverty Law*

Melissa R. Lee
Robert S. Chang
Ronald A. Peterson Law Clinic
1112 E. Columbia St.
Seattle, WA 98122
206-398-4394
leeme@seattleu.edu
changro@seattleu.edu
Attorneys for Amici Curiae *Fred T. Korematsu Center for Law and Equality and ACLU-WA*

Michael J. Saltz
Jacobsen, Russell, Saltz, Nassim & De La Torre, LLP
1880 Century Park East, Suite 900
Los Angeles, CA 90067
msaltz@jrsnd.com
310-446-9900
and Jeffrey E. Bilanko
Carroll, Biddle, & Bilanko, PLLC
801 2nd Avenue, Suite 800
Seattle, WA 98104
206-489-5549
jbilanko@cbblegal.com
Attorneys for Amicus Curiae *NCRA*

Douglas E. Smith
Littler Mendelson, P.C.
600 University Street, Suite 3200
Seattle, WA 98101-3122
206-623-3300
desmith@littler.com
Attorneys for Amici Curiae *CDIA/NAPBS*

DATED February 1, 2019.

s/ Marisa Johnson
Marisa Johnson

Peter S. Holmes
Seattle City Attorney
701 Fifth Ave., Suite 2050
Seattle, WA 98104-7097
(206) 684-8200